

Message Text

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LIMDIS FOR THE AMBASSADOR FROM LEGAL ADVISOR

E.O. 11652:GDS

AGS:PDIP

SUBJECT:POSSIBLE EXTRADITION OF BOLES LAV MAIKOWSKIS

SUMMARY:

1. SINCRELY REGRET DELAY IN RESPONDING TO YOUR INQUIRY RE MAIKOWSKIS. WE HAVE GIVEN THE MATTER SERIOUS CONSIDERATION IN AN EFFORT TO BE AS RESPONSIVE AS POSSIBLE TO ISRAELI DESIRES. ISSUES RAISED BY TAMIR'S INQUIRY HAVE BEEN REVIEWED EXTENSIVELY. WE HAVE REACHED THE CONCLUSION, IN CONSULTATION WITH DEPARTMENT OF JUSTICE, THAT THE USG DOES NOT HAVE THE LEGAL AUTHORITY UNDER THE U.S.-ISRAELI EXTRADITION TREATY TO EXTRADITE MAIKOWSKIS TO ISRAEL. YOU MAY WISH TO BE ABLE TO GIVE ADEQUATE EXPLANATION OF LEGAL BASIS FOR OUR CONCLUSION, WHICH IS STATED BELOW FOR USE AS YOU SEE FIT.

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TION OF LEGAL BASIS FOR OUR CONCLUSION, WHICH IS STATED BELOW FOR USE AS YOU SEE FIT.

2. OUR LEGAL CONCLUSION IS BASED ON TWO GROUNDS:

A. UNDER U.S. LAW, THE LANGUAGE OF ARTICLE III OF THE U.S.-ISRAEL EXTRADITION CONVENTION OF 1962 DOES NOT PROVIDE

SUFFICIENT AUTHORITY TO ALLOW THE U.S. TO SURRENDER
MAIKOWSKIS. ARTICLE III STATES, "WHEN THE OFFENSE HAS
BEEN COMMITTED OUTSIDE THE TERRITORIAL JURISDICTION OF THE

REQUESTING PARTY, EXTRADITION NEED NOT BE GRANTED UNLESS
THE LAWS OF THE REQUESTED PARTY PROVIDE FOR PUNISHMENT OF
SUCHAN OFFENSE COMMITTED IN SIMILAR CIRCUMSTANCES."
BECAUSE THE U.S. DOES NOT HAVE JURISDICTION TO TRY AN
OFFENDER LIKE MAIKOWSKIS, ARTICLE III PROVIDES THAT
EXTRADITION NEED NOT BE GRANTED. IT IS RECOGNIZED THAT
ARTICLE III COULD BE CONSTRUED TO IMPLY THAT EXTRADITION
MIGHT BE GRANTED. HOWEVER, UNDER A LEADING U.S.
SUPREME COURT EXTRADITION CASE WHICH INTERPRETED SIMILAR
LANGUAGE IN ANOTHER U.S. EXTRADITION TREATY, THE COURT
RULED THAT SUCH DISCRETIONARY LANGUAGE, NEGATIVELY
DERIVED (I.E., FROM THE "NEED NOT" LANGUAGE), WAS IN-
SUFFICIENT AUTHORITY AS A MANNER OF DOMESTIC LAW TO GIVE
POWER TO EXTRADITE. THE COURT HELD THAT AUTHORITY TO
EXTRADITE MUST BE GRANTED BY EXPLICIT LANGUAGE AND, THERE-
FORE, THAT LANGUAGE LIKE "NEED NOT" WAS INSUFFICIENT.
BASED ON THIS U.S. SUPREME COURT CASE, WE BELIEVE U.S.
LACKS AUTHORITY TO EXTRADITE, UNDER THE U.S.-ISRAELI
TREATY, ANY PERSON WHO COMMITS A CRIME OUTSIDE THE TERRI-
TORY OF ISRAEL WHERE U.S. LAW DOES NOT HAVE SIMILAR
EXTRATERRITORIAL EFFECTS.

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B. WE DO NOT BELIEVE PRINCIPLE OF DUAL CRIMINALITY
IS MET IN THIS CASE. EXTRADITION USUALLY CAN ONLY BE
GRANTED IF THE OFFENSE FOR WHICH EXTRADITION IS REQUESTED
IS AN ACT WHICH IS PUNISHABLE UNDER THE LAWS OF BOTH THE
REQUESTING AND REQUESTED STATES. WHILE NOT EXPLICITLY
SET OUT IN THE TREATY WITH ISRAEL, THIS PRINCIPLE IS
REFLECTED IN ARTICLE V OF THE TREATY WHICH
STATES THAT EXTRADITION SHALL BE GRANTED ONLY IF THE
EVIDENCE IS SUFFICIENT, ACCORDING TO THE LAWS OF
THE PLACE WHERE THE PERSON SOUGHT SHALL BE FOUND, TO
JUSTIFY HIS COMMITMENT FOR TRIAL IF THE OFFENSE OF WHICH
HE IS ACCUSED HAD BEEN COMMITTED IN THAT PLACE. THIS
PROVISION HAS THE EFFECT OF ESTABLISHING THE
PRINCIPLE OF DUAL CRIMINALITY. FOLLOWING IS QUOTATION
ON THE POINT FROM 6 WHITEMAN'S DIGEST 774: QUOTE: THE
EXTRADITION TREATY OF 1930 BETWEEN THE UNITED
STATES AND GERMANY (U.S. TS 836) SPECIFICALLY PROVIDES
THAT PERSONS SHALL BE EXTRADITED FOR THE OFFENSES
ENUMERATED IN THE TREATY "ONLY IF THEY ARE PUNISHABLE
AS CRIMES OR OFFENSES BY THE LAWS OF BOTH COUNTRIES".
GENERALLY, HOWEVER, THE EXTRADITION TREATIES OF THE
UNITED STATES DO NOT CONTAIN A SPECIFIC PROVISION (ON

DUAL CRIMINALITY) IN THOSE TERMS BUT DO PROVIDE THAT "SURRENDER SHALL TAKE PLACE ONLY UPON SUCH EVIDENCE OF CRIMINALITY AS, ACCORDING TO THE LAWS OF THE PLACE WHERE THE FUGITIVE OR PERSON SO CHARGED SHALL BE FOUND, WOULD JUSTIFY HIS COMMITMENT FOR TRIAL IF THE CRIME OR OFFENSE HAD BEEN THERE COMMITTED". AS MAY BE SEEN, THIS PROVISION CONTAINS REQUIREMENTS REGARDING BOTH THE NATURE OF THE OFFENSE AND THE AMOUNT OF EVIDENCE OF THE ACCUSED'S CUPABILITY. IT REQUIRES THAT THERE MUST BE A SUFFICIENT AMOUTN OF EVIDENCE OF GUILT PRODUCED TO JUSTIFY, UNDER THE LAWS OF THE REQUESTED STATE, THE ACCUSED'S DETENTION AND COMMITMENT FOR TRIAL. IT FOLLOWS THAT THIS EVIDENCE MUST ALSO DISCLOSE THE COMMISSION OF AN OFFENSE FOR WHICH, UNDER THE LAWS OF THE REQUESTED STATE, HE WOULD BE LIABLE
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TO DETENTION AND COMMITMENT FOR TRIAL HAD THE ACTS BEEN COMMITTED IN THE REQUESTED STATE. END QUOTE. IN THIS CASE, THE LAW OF THE U.S. DOES NOT RECOGNIZE A SIMILAR OFFENSE, I.E., CRIMES AGAINST THE JEWISH PEOPLE WITH INTENT TO DESTROY THE JEWISH PEOPLE. ACCEPTANCE OF THE ISRAELI REQUEST WOULD BE INCONSISTENT WITH ARTICLE 5 OF THE TREATY.

3. BASED ON THESE LEGAL CONSIDERATIONS WE AND JUSTICE DEPARTMENT AGREE THAT MAIKOWSKIS COULD SUCCESSFULLY DEFEAT AN EFFORT TO EXTRADITE HIM UNDER US LAW.

4. YOU MAY WISH TO ADVISE GOI THAT JUSTICE DEPARTMENT SOME MONTHS AGO INITIATED DEPORTATIONS PROCEEDINGS AGAINST MAIKOWSKIS BASED ON HIS ALLEGED COLLABORATION WITH THE NAZI REGIME. THE CASE IS BEING ACTIVELY PURSUED. JUSTICE DEPARTMENT ATTORNEY RESPONSIBLE FOR THIS MATTER WILL BE TRAVELLING TO THE SOVIET UNION LATER THIS YEAR TO OBTAIN DEPOSITIONS FROM EYE-WITNESSES TO BE USED IN PROCEEDINGS AGAINST HIM. THERE IS NO WAY TO GIVE A REALISTIC ESTIMATE OF WHEN DEPORTATION PROCEEDINGS MAY BE COMPLETED GIVEN THE RIGHTS TO APPEAL THAT PERSONS FACING DEPORTATION MAY EXERCISE. (SEE 8 U.S.C. 1101 ET SEQ.) WE RECOGNIZE THAT DEPORTATION MAY GIVE LITTLE SATISFACTION TO ISRAEL, SINCE U.S. DEPORTATION LAW WOULD NOT PERMIT US TO DEPORT HIM TO ISRAEL AND WOULD PERMIT HIM TO CHOOSE COUNTRY TO WHICH HE GOES. WE BELIEVE EXISTENCE OF DEPORTATION CASE AGAINST MAIKOWSKIS INDICATES IMPORTANCE U.S. ATTACHES TO TAKING ACTIVE MEASURES TO PURSUE AND DEPORT ALLEGED NAZI WAR CRIMINALS.

5. REGRET WE DO NOT THINK EXTRADITION REQUEST AGAINST MAIKOWSKIS CAN OVERCOME LEGAL DEFECTS SET OUT ABOVE.
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ISRAELIS SHOULD ALSO BE ADVISED THAT EXTRADITION REQUEST
COULD EXTEND PERIOD THAT MAIKOWSKIS REMAINS IN U.S., IF IT
DELAYED CURRENT DEPORTATION PROCEEDINGS. NONETHELESS,
IF ISRAEL PRESSES EXTRADITION REQUEST, WE WOULD MAKE
MAXIMUM EFFORT TO PERSUADE JUSTICE DEPARTMENT TO

SUBMIT IT TO THE APPROPRIATE U.S. DISTRICT COURT FOR
HEARING, AND TO PRESENT STRONGEST POSSIBLE CASE TO COURT,
OF THE DIFFICULTIES. VANCE

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